

DR 92-009

CRANMORE MOUNTAIN RESORT, LBO HOLDINGS D/B/A ATTITASH BEAR PEAK,  
LOON MOUNTAIN RECREATIONAL CORP. AND WATERTOWN VALLEY SKI RESORT,  
INC.

New Hampshire Electric Cooperative, Inc.

Order on Motion for Clarification

O R D E R    N O.    23,384

January 7, 2000

**I.    PROCEDURAL HISTORY**

On May 26, 1999, Cranmore Mountain Resort, LBO Holdings d/b/a Attitash Bear Peak, Loon Mountain Recreational Corp. and Waterville Valley Ski Resort, Inc. (collectively, the "Ski Areas") filed with the New Hampshire Public Utilities Commission ("Commission") a Motion for a Clarification of its Order No. 20, 618 (October 5, 1992). Public Service Company of New Hampshire filed its Objection to the Motion on June 7, 1999. Thereafter, on June 17, 1999, the Ski Areas filed a Reply to PSNH's Objection. On September 8, 1999, the Ski Areas filed a request to schedule a hearing on its Motion. By Secretarial Letter dated September 17, 1999, the Commission stated that a hearing was not necessary or appropriate and denied the request.

**II.   SKI AREA PETITION**

The Ski Areas request that the Commission clarify its Order No. 20,618 regarding its approval of the Amended and Restated Partial Requirements Agreement of 1992 ("APRA") between PSNH and the

New Hampshire Electric Cooperative ("NHEC"). Specifically, the Ski Areas request that the Commission clarify that its understanding and intent in granting the approval was that costs billed to NHEC under PSNH's wholesale Fuel and Purchase Power Adjustment Clause ("FPPAC") would be "substantially similar" to those billed under PSNH's retail FPPAC. Accordingly, the Ski Areas argue, PSNH is obligated to credit the wholesale FPPAC with revenues received from the transfer of capacity from PSNH just as the Company is required to credit the retail FPPAC with such revenues, pursuant to the Commission Order No. 22,847 (Docket No. DR 97-014). In support of this assertion, the Ski Areas state that:

1. The Ski Areas are among NHEC's largest retail customers, and take service under special contracts with NHEC which directly incorporate the wholesale FPPAC rate charged by PSNH to NHEC. Thus the Ski Areas claim they are directly affected by any overcharge from PSNH to NHEC.

2. The Ski Areas claim that they have suffered bill increases that are particularly onerous compared to other ski areas in PSNH's service territory. This disparity is alleged to have occurred as a result of the Commission's Order No. 22,847 in Docket No. DR 97-014 (February 10, 1998) requiring PSNH to credit the retail FPPAC with the revenues received from the transfer of capacity. It is claimed that the ski areas within PSNH's service territory receive the

benefit of the credit to the retail FPPAC, while the Ski Areas served by NHEC must pay the wholesale FPPAC costs, under which no comparable credit is flowed through.

3. In Docket DR 89-244, the Commission issued Order No. 19,889, which interpreted and implemented specific provisions of the Rate Agreement dated November 22, 1989 between NU and the State of New Hampshire. The Ski Areas assert that one of the express conditions in Order No. 19,889 "prohibited PSNH from recovering through the retail FPPAC 'the incremental cost of energy required to replace energy from resources sold pursuant to capacity sales contracts.'" The Ski Areas argue that this condition expressly "required PSNH to credit the retail FPPAC with an amount of capacity sales revenue equal to at least the incremental cost of replacement energy".

4. In Docket DR 97-014, the Commission issued Order No. 22,847 (issued February 10, 1998), which ruled on PSNH's March 14, 1997 Petition for an adjustment of its retail rates pursuant to the retail FPPAC. In that Order, the Commission determined that PSNH was required to flow-through the FPPAC for the benefit of ratepayers \$24.7 million received from Connecticut Light & Power ("CL&P") for the transfer of capacity and its attendant energy. CL&P is required to purchase this capacity from PSNH pursuant to the Capacity Transfer Agreements between PSNH and CL&P whenever CL&P is unable to meet its NEPOOL requirements.

5. The Ski Areas argue, in effect, that once the Commission interpreted the retail FPPAC as requiring the flow-through of payments for the transfer of capacity, the wholesale FPPAC should be interpreted in the same manner, and PSNH should flow-through the same payments for the transfer of capacity. This is because in granting its approval of the APRA in Docket No. DR 92-009, the Ski Areas claim that the Commission relied upon the testimony of PSNH that: 1) the APRA was "substantially similar to the . . . retail rate agreement between PSNH and the State"; and 2) the APRA directly incorporated two provision from the Rate Agreement - the FPPAC and the ROE Collar. The Ski Areas cite to Order No. 20,618 (October 5, 1992), 77 NHPUC 587, where the Commission specifically found that the APRA's power costs were fixed for the contract period "on terms similar to those already approved by this Commission for PSNH in Docket DR 89-244." 77 NHPUC at 597.

### **III. PSNH OBJECTIONS**

PSNH filed its objections to the Ski Areas Motion on June 7, 1999. PSNH raised several grounds in support of its objection:

1. Lack of standing - PSNH claims that the Ski Areas have not been and are not now parties to this docket, that Rule PUC 203.04(a) provides that only parties may file motions, and therefore the Ski Areas lack standing to submit the motion.

2. Federal Preemption - PSNH claims that, pursuant to Section 201(b) of the Federal Power Act, 16 U.S.C. §824(b), FERC has exclusive jurisdiction to regulate the transmission and sale at wholesale of electric energy in interstate commerce. The APRA and its FPPAC component, it is asserted, are totally regulated by FERC and not this Commission, and therefore, under the Supremacy Clause of the U.S. Constitution (U.S. Const. Art. VI, cl. 2) the Commission is preempted from granting the requested relief.

3. *Res Judicata* - PSNH argues that the exact issue in the Ski Areas' Motion for Clarification has already been decided against them in the FERC's "Order Denying Rehearing and Dismissing Complaint" issued on June 1, 1999<sup>1</sup> (June Order) discussed below. Since the issues raised are identical to those raised at FERC and the parties raising the issues are the identical parties who sought and were granted intervenor status by FERC, PSNH asserts that based upon the doctrine of *res judicata*, the Ski Areas are estopped from seeking the relief requested in their Motion.

4. Laches - PSNH further claims that since the contract language of the APRA was agreed to on July 22, 1992, and the Ski Areas apparently relied heavily upon language that they now contend

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New Hampshire Electric Cooperative, Inc. v. Public Service Company of New Hampshire, Docket Nos. EL98-35-001, ER99-1158-001, and EL99-52-000, 87 FERC ¶61,258.

is and was ambiguous, they should have moved for clarification seven years ago. Moreover, PSNH claims that the precise issue contained in the Ski Areas' Motion was raised before the FERC as early as March, 1997, that the Ski Areas failed to intervene in that proceeding and have "wait[ed] to come to this Commission over four years later." (PSNH Objections at 4.) PSNH concludes that the Ski Areas' unreasonable delay in pursuing their claims bar them from bringing their present Motion under the equitable doctrine of laches.

5. Finally, PSNH notes that the Ski Areas failed to comply with Rule Puc 203.04(e) which requires moving parties to make a good faith effort to obtain the concurrence of all parties to any motion. PSNH alleges that the Ski Areas made no attempt to comply with the requirements of this rule, and as a result of their non-compliance the Motion should be rejected.

#### **IV. PROCEEDINGS AT FERC**

On March 27, 1995, NHEC filed a complaint with the Federal Energy Regulatory Commission ("FERC") challenging certain costs that PSNH had passed through the wholesale FPPAC of the APRA. This complaint was docketed by the FERC as No. EL98-37-000. The complaint alleged, in part, that PSNH violated its obligation to maintain rate parity between wholesale and retail customers under stipulations with the Commission. According to NHEC's complaint, the wholesale and retail FPPAC provisions were "nearly identical", and the wholesale

customers deserved to benefit from the retail settlements.

On March 23, 1998, NHEC filed a second complaint with FERC involving the APRA and the wholesale FPPAC, docketed as EL98-35-000. This complaint broadly challenged costs that PSNH sought to pass through the FPPAC. NHEC specifically challenged PSNH's exclusion of credits associated with the transfer of capacity to CL&P, and argued that since the New Hampshire Commission required PSNH to credit the retail FPPAC with the revenues from this capacity transfer, the FERC should do the same.

The FERC issued its order on these complaints on November 30, 1998. *See New Hampshire Electric Cooperative, Inc. v. Public Service Company of New Hampshire, Docket Nos. EL95-37-000 and EL98-35-000*, 85 FERC ¶61,310. The order dismissed the first complaint to the extent that the relief requested was based on the argument that the wholesale customers were entitled to rate parity with the retail customers. FERC found that NHEC had not shown that the retail settlements were intended to affect the wholesale rates, and that even if they were, FERC would not accept the result as binding as the New Hampshire Commission did not have the authority to set the lawful rates that are under the FERC's jurisdiction.

The order also dismissed the portions of the second complaint that requested FERC order PSNH to include in the FPPAC the \$27 million credit for the Capacity Transfer Agreement revenues

received from CL&P.

NHEC has not pointed to any section of the wholesale FPPAC that states that credits of this type must be flowed through to the customer. Rather, NHEC relies upon the NHPUC's decision to require that these credits be flowed through the retail FPPAC. Notwithstanding the NHPUC's interpretation of the retail FPPAC provisions and the scope of its general authority to make "equitable" adjustments to the retail rates before it, we cannot grant the requested relief. We do not interpret the wholesale FPPAC to require the pass-through of such credits. 85 FERC ¶61,310 at 62,222.

On December 30, 1998, NHEC filed a request before the FERC for a rehearing of the above order<sup>2</sup> (November Order), arguing, in part, that the FERC should require PSNH to include the credit for the Capacity Transfer Agreement revenues that PSNH receives from CL&P because the New Hampshire Commission interpreted the retail FPPAC to require their inclusion. The Ski Areas were granted intervention in this rehearing.

In its "Order Denying Rehearing and Dismissing Complaint" issued on June 1, 1999 (June Order) the FERC denied NHEC's request for a rehearing of the November Order. The FERC explained its determination on this question:

The November Order held that the FPPAC cannot be properly interpreted to require the offsetting of costs with credits for these particular revenues. The Commission reached this decision by examining the entire FPPAC,

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A rehearing request raising additional issues not relevant to this proceeding was filed by NHEC on March 29, 1999, with respect to a FERC Letter Order issued on March 1, 1999.



noting the existence of specified credits and the absence of any mention of the type of credit requested here. With regard to the New Hampshire Commission's interpretation of the retail FPPAC, this Commission has an independent duty to evaluate the rate agreements before it and is not bound by *res judicata* to accept the contract interpretations of another commission. 87 FERC ¶61,258 at 61,983.

## V. COMMISSION ANALYSIS

### A. Initial Matters

Standing - We find that PSNH's claim that the Ski Areas lack standing to seek clarification to be without merit. As parties to Commission-approved special contracts with NHEC, the Ski Areas have standing to seek clarification of the terms of those contracts. As discussed below, those special contracts incorporate, in part, certain terms of the wholesale contract between NHEC and PSNH. In addition, the Commission, in its discretion, may treat this matter as a complaint, pursuant to RSA 365:1, or conduct its own investigation of the issue pursuant to RSA 365:5. Rather than embark on such a procedurally circuitous route, we will treat the Ski Areas motion as a motion for clarification of the FPPAC terms incorporated into their special contracts, and find that the Ski Areas have standing to raise such concerns.

Res Judicata - The contracts between the Ski Areas and NHEC are *retail* contracts, subject to the jurisdiction and interpretation of this Commission. This Commission has an independent statutory duty to evaluate the rate agreements before it

and, under the circumstances in this docket, finds that it is not bound by *res judicata* to accept the contract interpretations of the FERC.

Laches - Whether laches should be applied to preclude a litigant from pursuing a claim is a fact issue for resolution by the Commission. *Cote v. Cote*, 94 N.H. 372 (1947). When evaluating a laches defense, the courts consider whether the party claiming laches has demonstrated that there has been an unreasonable and prejudicial delay in prosecuting the claim. The Commission's Order No. 22,847, which interpreted the retail FPPAC, was issued on February 10, 1998. Shortly thereafter, NHEC pursued the question of the interpretation of the wholesale FPPAC before the FERC, which issued its Final Order in Docket EL98-35-000 on November 30, 1998, and subsequent Order Denying Rehearing on June 1, 1999. (As indicated above, the Ski Areas sought and were granted intervenor status in the rehearing before the FERC.) The Ski Areas filed the instant motion on May 26, 1999. In this instance it does not appear that the Ski Areas unjustly delayed bringing this issue forward.

Failure to Comply with Rule Puc 203.04(e) - Rule Puc 203.04(e) requires moving parties to make a good faith effort to obtain the concurrence of all parties to any motion. While the Commission does not condone the Ski Areas failure to comply with this requirement, we will not employ it as a basis to dismiss the motion.

The movant is advised, however, that the Commission expects full compliance with its procedural rules, and that failure to comply may result in the loss of procedural rights.

**B. Ruling on Motion for Clarification**

The Ski Area contracts are special retail contracts, pursuant to RSA 378:18, between the Ski Areas and the NHEC. Power for all the retail sales from NHEC to the Ski Areas under the special contracts are provided by PSNH pursuant to the Interruptible Power Supply Service Agreement between NHEC and PSNH accepted by the FERC on October 18, 1994 in Docket No. ER94-1513-000. The Interruptible Agreement amended the APRA, which had formerly provided all of the wholesale power which NHEC purchased from PSNH. The Commission approved all four of the Ski Area Contracts at issue in Order No. 21,812 (Docket Nos. DR 94-258, 94-259, 94-260, and 94-261, issued September 6, 1995). That order approved the contracts as proposed by the parties, including the fuel and purchase power provisions at issue. Therefore, a review of the contracts is necessary to determine the nature and scope of the obligations that were created.

The contracts for each of the Ski Areas are identical in almost all respects: they each provide, under Article 3 - Rates and Billing Determinants, for a Monthly Energy Charge which is to be the greater of the charges as specified in the contract or the sum of (1) the PSNH wholesale FPPAC Base, (2) the PSNH wholesale FPPAC Rate, and

(3) the PSNH wholesale Nuclear Decommissioning Charge. The energy charge floor provisions in the contracts were included to ensure NHEC that the revenues received from the Ski Areas are not less than the marginal cost to purchase power from PSNH to serve the Ski Areas. (See NHEC Exhibit No. 1, Testimony of Teresa L. Muzzey at p.5, Docket Nos. Dr 94-258, 94-259, 94-260, and 94-261.)

The terms "FPPAC Rate" and "FPPAC Base" are specifically defined in each contract:

FPPAC Base Amount ("BA"): The amount of Fuel and Purchased Power Adjustment Clause (FPPAC) costs included in PSNH's base energy rates to NHEC under FERC Rate Schedule No. 142.

FPPAC Rate: The amount of FPPAC costs above or below the FPPAC Base Amount which are included in PSNH's base rates to NHEC under FERC Rate Schedule No. 142.

These special contracts incorporate and reference in their definitions of FPPAC Base Amount and FPPAC Rate the amounts provided for in PSNH's rates to NHEC under the FERC wholesale rate schedule. The referenced rate schedule (Rate Schedule No. 142) is further defined as the rates "as accepted and approved by the FERC." We find that the plain language of these terms is unambiguous and indicates that it was the parties' intent to calculate the Monthly Energy Charge under Article 3 of these special contracts on the basis of the wholesale FPPAC, as that term was to be interpreted by the FERC. This interpretation is supported by the testimony offered in Docket

Nos. DR 94-258, 94-259, 94-260, and 94-261. The Ski Areas were represented in the hearing of these Dockets by Reduced Energy Specialists, and did not dispute any of the testimony offered.

This Commission has ordered that the *retail* FPPAC flow-through, for the benefit of ratepayers, the amounts PSNH receives from Connecticut Light & Power ("CL&P") for the transfer of capacity and its attendant energy. The Commission reached this determination based upon its interpretation of the FPPAC formula and its plenary ratemaking authority pursuant to RSA 378:7 to set just and reasonable rates. See, Order No. 22,847 in DR 97-014, 83 NHPUC at 68:

Thus, to the extent the FPPAC formula does not accommodate the flow-through of capacity revenues, we will exercise our general ratemaking authority and flow-through the \$27.4 million in capacity transfer revenues to ratepayers concurrent with this FPPAC period. We take this action only to the extent necessary to avoid an injustice to ratepayers and a windfall to shareholders.

The FERC, on the other hand, has interpreted the *wholesale* FPPAC, which is identical to the retail FPPAC, as not requiring this credit, based on its examination of the FPPAC formula and its conclusion that PSNH included the revenues from these capacity sales as a credit in the base rates. (June 1 Order, 87 FERC ¶61,258 at 61,983.)

We have previously stated that we will defer to the FERC's interpretation of the terms and conditions of the APRA. See, for example, Order No. 22,100, issued April 12, 1996, 81 NHPUC 276. ("To

the extent that the APRA provides PSNH with a remedy to offset any such revenue losses, we concur with PSNH that the appropriate forum to adjudicate that matter is with the FERC.") Since the special contracts in question incorporate the *wholesale* FPPAC from the APRA, this component of these contracts should be interpreted as determined by the FERC.

The Ski Areas reliance on the original Commission order approving the APRA does not support its claim that the retail and wholesale FPPACs would be calculated in the exact same manner. The portion of Order No. 20,618 in Docket DR 92-009 cited to only states that "Many of the power costs have been fixed for the entire period of the contract on terms *similar* to those already approved by this Commission for PSNH in DR 89-244." (Emphasis supplied.) This was only one of several bases for the Commission's approval of the APRA. See 77 NHPUC 586 at 597.

We also note that though these special contracts were intended to provide the ski areas served by NHEC with similar benefits to those ski areas served by PSNH, it was also recognized that the special contracts for NHEC's ski areas and PSNH's ski areas were not equal, and that, at least initially, ". . . the savings are larger for NHEC's ski areas and the average price per kWh is lower." Order No. 21,812 at 9.

**Based upon the foregoing, it is hereby**

**ORDERED,** that the Ski Areas' Motion for Clarification is denied.

By order of the Public Utilities Commission of New Hampshire this seventh day of January, 2000.

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Douglas L. Patch  
Chairman

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Susan S. Geiger  
Commissioner

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Nancy Brockway  
Commissioner

Attested by:

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Thomas B. Getz  
Executive Director and Secretary